1989

Nationwide Insurance Company v. Fereidoun E. Pourmirzaie : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

NATIONWIDE INSURANCE COMPANY,

Plaintiff/Respondent,

vs. Civil No. 890563-CA

FEREIDOUN E. POURMIRZAIE,

Defendant/Appellant.

Priority #16

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

IN THE UTAH COURT OF APPEALS

NATIONWIDE INSURANCE COMPANY,

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vs.

FEREIDOUN E. POURMIRZAIE,

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BRIEF OF RESPONDENT

Civil No. 890563-CA

STATEMENT OF JURISDICTION AND PROCEEDINGS BELOW

Defendant asserts jurisdiction in this court under Section 78-2-2(3)(j), Utah Code Ann. (1953, as amended). Mr. Pourmirzaie appeals from the Third Judicial District Court's Entry of Judgment in favor of Nationwide Insurance Co., on a jury verdict.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion by granting the defendant a limiting jury instruction rather than his motion for mistrial?

2. Was the trial court's instruction to the jury regarding the standard of proof for punitive damages being "preponderance of the evidence" in error when this case came to trial prior to the adoption of Utah Code Ann. § 78-18-1 (1953, as amended) which set forth "clear and convincing evidence" as the standard of proof for punitive damages?" If so, did this instruction substantially prejudice the defendant or was it just a "harmless error"?

3. Did the trial court err when it awarded attorney's fees to the plaintiff pursuant to Utah Code Ann. § 78-27-56 (1953, as amended)?

STATEMENT OF THE CASE

A. Nature of the Case

This case is a civil action for fraud on the plaintiff insurance company. The defendant/appellant intentionally misrepresented the facts regarding the condition and disappearance of his automobile for the purpose of deceiving plaintiff into paying insurance benefits.

B. Course of Proceedings & Disposition in Court Below

On January 17 and 18, 1989 a jury trial was held. The jury, on special verdict, found that the defendant had defrauded the plaintiff. As a result, the plaintiff was awarded compensatory damages of $29,150.00, prejudgment interest thereon in the amount of $12,155.00 as of January 23, 1989, punitive damages of $10,000.00, attorney's fees of $8,385.50, and costs of $263.60.

C. Statement of the Facts

1. In the opening statement at trial, plaintiff's counsel indicated that Mr. Ovard, a witness, would testify as to the amount, number and sequence of claims that the defendant had filed with the plaintiff in the two years that he was insured with them. (Transcript p. 7).

2. During the trial the defendant was asked whether his marriage to his ex-wife was for the purpose of establishing his

permanent residency in the United States. The question was deemed improper by the trial judge and the answer was stricken. (Transcript p. 17).

3. The plaintiff's counsel in a discussion before the bench indicated that these lines of questioning were pursued in an attempt to show that the defendant had a practice of routinely or habitually defrauding people. This evidence was presented pursuant to Utah R. Evid. 406. (Transcript p. 125).

4. After being recalled as a witness by the defense, Mr. Ovard volunteered information pertaining to the defendant's activities while being questioned by the defendant's counsel. (Transcript p. 167). Since the evidence came in through a volunteered statement the trial judge granted the defendant's request to have it stricken and the jury admonished. (Transcript p. 167).

5. The defendant alleged that the cumulative effect of the volunteered testimony and questions (set forth in statements 1, 2 & 4) was such that his case was prejudiced. (Transcript p. 170). The trial court denied the defendant's motion for mistrial and a motion to dismiss the fraud cause of action. (Transcript p. 173).

6. Prior to the jury's deliberations, they were instructed that in order to find the defendant guilty of fraud they must affirmatively conclude that he had knowingly made false representations to the plaintiff with the intent of causing the plaintiff

to rely on those representations. The jury was told that the burden of proof for these findings was "clear and convincing evidence." (Addendum no. 1).

7. With regards to punitive damages the jury was instructed that they could not hold the defendant liable for such damages unless they found that he acted with malicious intent or willful disregard for the rights of the plaintiff. The court further instructed the jury that the burden of proof for establishing these damages is "preponderance of the evidence." (Addendum no. 2).

8. To insure that the alleged trial improprieties did not prejudice the defendant's case an instruction was given to the jury limiting the statements and evidence that they could consider in their deliberations. The instruction directed them to consider as evidence only statements by counsel that were made as an admission or stipulation conceding the existence of a fact or facts" and evidence which was accepted by the court. (Addendum no. 3).

SUMMARY OF THE ARGUMENT

The defendant asserts that the lower court erred in refusing to grant a mistrial based upon alleged improprieties at trial. In his argument however, the defendant has not alleged, let alone demonstrated, that the trial judge abused his discretion. In addition, it cannot be said that the trial judge abused his

discretion by granting a limiting jury instruction rather than the motion for mistrial. Therefore, since the record does not show an abuse of discretion and because the defendant has not demonstrated such an abuse it would be improper for this court to overturn the lower court's ruling.

Next, it is asserted that the jury should have been instructed that "clear and convincing evidence" is the standard of proof for punitive damages rather than "preponderance of the evidence." This argument fails in that it does not recognize that "clear and convincing evidence" did not become the standard of proof for punitive damages until section 78-18-1 of the Utah Code Annotated was enacted in 1989, several months after the disposition of this case.

Moreover, if the jury instruction as to punitive damages was in error, it is harmless error since the jury found by "clear and convincing" evidence that the defendant had intentionally defrauded the plaintiff. Thus, because the jury affirmatively decided that the evidence clearly and convincingly demonstrated that the defendant committed fraud, it is harmless error that they did not consider the very same issue again.

Finally, the trial judge did not err in failing to submit the issue of attorney's fees to the jury. The statute that confers power upon the court to award such fees grants the court, not the jury, express authority to make such determinations.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL.

The general rule is that "[t]he granting of a motion for a mistrial lies in the sound discretion of the trial judge and his ruling should be overturned only when it clearly appears that he has abused his discretion." Watkins & Faber v. Whiteley, 592 P.2d 613, 616 (Utah 1979).

In Watkins, the Utah Supreme Court upheld the decision of the trial court denying a motion for a mistrial because of a question asked the defendant on cross-examination. In that case, as here, the defendant on appeal claimed that the question was unfair because it gave the jury a wrong impression of his integrity. Id. at 615. The Utah Supreme Court in finding that the trial court did not abuse its discretion in refusing to grant a mistrial, declared that "[a] mistrial should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." Id. at 616.

In Wellman v. Noble, 366 P.2d 701 (Utah 1961), where a new trial was granted, the Utah Supreme Court noted that the trial judge has discretion to grant a new trial when he believes that the jury has clearly misapplied the facts or the law or that the verdict was the result of passion and prejudice. Id. at 703.

Referring to the abuse of discretion test used to overturn rulings by trial judges, the Utah Supreme Court stated:

> Such test depends largely on the reaction and judgment of the trial judge. The members of this court and other persons might react to the same situation differently. This makes it very difficult for a reviewing court to determine whether there has been an abuse of trial court's discretion. However, since the trial judge has seen and heard the witnesses and had a first-hand view of all the evidence, and the proceedings throughout the trial and has ruled on the admissibility of the evidence, and instructed the jury on the law governing the verdict, and had opportunity of observing the tactics of counsel throughout the trial and the jury's reaction thereto, his ruling on a motion for a new trial should not be overruled unless it clearly appears he has abused his discretion.

Id. at 704.

In another case, the Utah Supreme Court stated that it "will presume that the discretion of the trial court was properly exercised unless the record clearly shows the contrary." Goddard v. Hickman, 685 P.2d 530, 534-5 (Utah 1984) (citation omitted).

In the present case there is nothing in the record which "clearly" shows that the trial judge abused his discretion in denying the defendant's motion for mistrial. Therefore, this court should not overturn the trial judge's denial of the Motion for Mistrial.

POINT II

THE LOWER COURT DID NOT ERR IN PERMITTING THE JURY TO AWARD PUNITIVE DAMAGES.

A. AT THE TIME THIS CASE WENT TO TRIAL PREPONDERANCE OF THE EVIDENCE WAS THE STANDARD OF PROOF NECESSARY TO GET PUNITIVE DAMAGES.

At the time this case went to trial, there was no statutory provision for awarding punitive damages, nor was there any Utah case law setting forth the standard of proof for awarding such damages. See U.C.A. 78-18-1 (1953) (amended 1989).

The traditional standard of proof necessary to award damages is "preponderance of evidence." Robinson v. Hreinson, 409 P.2d 121, 125 (Utah 1966). Prior to 1989, no differentiation was made in Utah between general and punitive damages as to the burden of proof necessary to prove such damages. See e.g. Atkin Wright & Miles v. Mountain States Tele. & Tele. Co., 709 P.2d 330 (Utah 1985); Bundy v. Century Equip. Co., 692 P.2d 754 (Utah 1984); Amoss v. Broadbent, 514 P.2d 1284 (Utah 1973). Therefore, it was not error for the court to instruct the jury as to the standard of proof being "preponderance of evidence."

B. EVEN IF THE STANDARD OF PROOF FOR PUNITIVE DAMAGES IS "CLEAR AND CONVINCING EVIDENCE" INSTRUCTING THE JURY THAT THE STANDARD IS "PREPONDERANCE OF THE EVIDENCE" WAS A HARMLESS ERROR.

Even if the lower court erred in instructing the jury as to the burden of proof for punitive damages it is a harmless error. The Utah Rules of Civil Procedure, Rule 61 states that:

> No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

In the present case, if the jury instruction as to punitive damages is in error it is not substantial and prejudicial. The burden of proof for insurance fraud is clear and convincing evidence. Thus, to find the defendant guilty of insurance fraud the jury had to find that the evidence "clearly and convincingly" demonstrated that the defendant had defrauded the plaintiff. Since the jury had already found that the evidence presented at trial "clearly and convincingly" proved that the defendant intentionally lied, it can be asserted that punitive damages are justified even though the jury was not instructed as to that standard of proof. Certainly evidence which proves that the defendant intentionally lied so as to defraud the plaintiff constitutes knowing and reckless indifference towards the rights of others. Accordingly, such evidence is sufficient to justify punitive damages.

Therefore, even if the jury instruction as to the burden of proof for punitive damages was in error it is harmless error, thus this court should not reverse the lower court's award of punitive damages.

POINT III

THE LOWER COURT DID NOT ERR IN AWARDING THE PLAINTIFF ATTORNEY'S FEES.

Attorney's fees are not awarded unless they are contractually or statutorily provided for. Western Casualty & Surety Co. v. Marchant, 615 P.2d 423, 426 (Utah 1980). In the present case, the request for attorney's fees was based upon Utah Code Ann. § 78-27-56 (1953, as amended):

> (1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith . . . .

The defendant asserts that since he requested a trial by jury that all the issues in this case, including that of attorney's fees, must be decided by the jury unless an agreement between parties has been made, which agreement must appear on the record. In making this assertion the defendant relies upon Rule 39 of the Utah Rules of Civil Procedure, which in part reads:

> The trial of all issues so demanded shall be by jury, unless
>
> (1) The parties or their attorneys of record, by written stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or
>
> (2) The court upon motion or of its own initiative finds that a right of trial by jury on some or all of those issues does not exist . . .

In hinging his case upon Rule 39 the defendant fails to recognize that Subsection (a)(2) is applicable. Subsection (a)(2) plainly

states that when there is no right to a jury trial on a particular issue the court and not the jury will dispose of that issue. Id.

Particularly noteworthy is the distinction in Rule 39 between the right to trial by "jury" or by "the court". Id. This distinction is important to the case at hand since the statutory provision which confers the right to attorney's fees upon the plaintiff indicates that "the court [not the jury] shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit . . . ." Utah Code Ann. § 78-27-56 (1953, as amended) (emphasis added). In other words, the right to have a jury determine the issue of attorney's fees does not exist since the statutory provision which provides for such fees specifies that "the court" shall make the determination of that issue. Thus, the lower court did not err in not submitting this issue to the jury.

Furthermore, on the Special Verdict form, the Jury found that defendant had defrauded plaintiff. In order to do so, the Jury found that defendant lied about his auto theft claim. It is hard to imagine a defense with less merit than one which is based upon intentional lies, nor could such a defense, by any stretch of the imagination, have been brought or asserted in good faith.

In Topik v. Thurber, 739 P.2d 1101 (Utah 1987) the trial court's decision to award attorney's fees was affirmed because of

findings that the defense was partially in bad faith and the defendant's testimony constituted "willful falsehoods." The record supported findings of the trial court that the defendant attempted to avoid liability by testifying falsely. Since the same is true in the case at hand, attorney's fees are most appropriate.

In Cady v. Johnson, 671 P.2d 149 (Utah 1983) the court set out the standard for awarding attorney's fees under Utah Code Ann. § 78-27-56 (1953, as amended). Two elements are required in addition to being a prevailing party. First, the claim must be "without merit." The court defined "without merit" as "frivolous" or "of little weight or importance having no basis in law or fact." Certainly, lies have little weight or importance and without a doubt they have no basis in law or fact. The second element requires that the action or defense be lacking in "good faith." The court defined "good faith" as:

> (1) An honest belief in the propriety of the activities in question;
>
> (2) No intent to take unconscionable advantage of other; and
>
> (3) No intent to, or knowledge of the fact that the activities in question will, [sic] hinder, delay, or defraud others.

Cady, 671 P.2d at 151. The court stated that if only one of the foregoing three factors is lacking, good faith is absent. In the case at hand, all three factors are lacking. Fraud could never equate with "good faith."

CONCLUSION

First, since the record does not indicate that the trial judge abused his discretion and because the defendant has not established an abuse of discretion the trial court's denial of the Motion for Mistrial should not be overturned.

Second, it was not error for the trial court to instruct the jury that "preponderance of evidence" was the standard of proof for punitive damages. Even if the lower court did err in so instructing the jury it is a harmless error. Therefore, this court should not reverse the lower court's award of punitive damages.

Finally, the statute which provides for attorney's fees in civil actions expressly provides for the court to make any and all determinations with regards to that issue, not the jury. Furthermore, attorney's fees were appropriate in the present case.

Consequently, this court should not reverse or modify any of the lower court's rulings or decisions regarding any of the issues raised by the defendant on appeal.

DATED this 5th day of _____, 1990.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Joy L. Clegg
Attorneys for Plaintiff-Respondent

ADDENDUM

1. Jury Instructions
2. Utah Rules of Civil Procedure
3. Statutes -- Utah Code Ann.
4. Utah Rules of Evidence

ADDENDUM 1

INSTRUCTION NO. 4

You should not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in these instructions, and in accordance with the law as herein stated.

INSTRUCTION NO. 12

By a preponderance of the evidence, as that term is used in these instructions, is meant that which to your minds is of the greater weight. The evidence preponderates to the side which, to your minds, seems to be the most convincing and satisfactory. The preponderance of the evidence is not alone determined by the number of witnesses, nor the amount of the testimony, but the convincing character of the testimony weighed by the impartial minds of the jury.

INSTRUCTION NO. 13

The essential elements in a fraud case are:

(1) That a representation was made;

(2) concerning a presently existing material fact;

(3) which was false;

(4) which the representor knew to be false.

(5) Intending to induce plaintiff to rely and act upon the misrepresentation;

(6) That plaintiff, in fact, was induced to rely and by its actions did rely upon the representation.

(7) That plaintiff's reliance upon the representation was reasonable and without knowledge of its falsity.

(8) That the plaintiff suffered damages as a result of its actions in reliance upon the representation.

INSTRUCTION NO. 15

The party with the burden of proof on the issue of fraud has the burden of proving all the elements of its claim on that issue to you by clear and convincing evidence. In this case Plaintiff has the burden of proof and if you conclude that Plaintiff has failed to establish its claim by clear and convincing evidence, you must decide against it on the issue you are considering.

What does "Clear and Convincing Evidence" mean? Clear and convincing evidence is a more exacting standard than proof by a preponderance of the evidence, or you need believe only that a party's claim is more likely true than not true. On the other hand, "Clear and Convincing" proof is not as high a standard as the Burden of Proof applied in criminal cases, which is proof beyond a reasonable doubt.

Clear and convincing proof leaves no substantial doubt in your mind. It is proof that establishes in your mind, not only that the proposition at issue is probable, but also that it is highly probable. It is enough that the party with the burden of proof establishes his claim beyond any "substantial doubt"; Plaintiff does not have to dispel every "reasonable doubt".

The burden of proof refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by clear and convincing evidence, you may consider the relevant testimony of all witnesses, regardless of whom may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

INSTRUCTION NO. 16

In addition to compensatory damages, under certain circumstances the law permits the jury to award an injured party punitive damages. Punitive damages punish a wrongdoer and serve as a warning to others not to engage in such conduct.

The jury may award a plaintiff punitive damages in this case if it finds by a preponderance of the evidence that plaintiff has been damaged as a result of acts or omissions of the defendant done either willfully or maliciously, or with reckless indifference toward and disregard of that plaintiff's rights. An act or omission is done willfully if it is done intentionally. An act or a failure to act is "maliciously" done if it is prompted or accompanied by ill will, spite, or grudge. "Recklessly" means wantonly, with indifference to consequences. If a person makes a representation without knowing whether it is true or not, or makes it without regard to its truth or falsity or to its possible consequences, he may be found to have made the representation recklessly.

ADDENDUM 2

Right preserved.

—Appeal from industrial commission.

This trial rule is not applicable to trial de novo in the district court on appeal from industrial commission's decision on a sex discrimination in employment case Beehive Medical Elecs., Inc. v. Industrial Comm'n, 583 P.2d 53 (Utah 1978).

—Court's discretion.

In circumstances where doubt exists as to whether a cause should be regarded as one in equity or one in law, wherein the party can insist on a jury as a matter of right, the trial court should have some discretion and may examine the nature of the rights asserted and the remedies sought in the light of the facts of the case to ascertain which predominates and, from that determination, make the appropriate order as to a jury or nonjury trial. Corbet v. Cox, 30 Utah 2d 361, 517 P.2d 1318 (1974).

Waiver.

—Failure to make written demand.

Failure to make a written demand for a jury trial upon the opposing party waives any error in a court's failure to grant a jury trial. Gasser v. Horne, 557 P.2d 154 (Utah 1976).

Cited in Stickle v. Union Pac. R.R., 122 Utah 477, 251 P.2d 867 (1952), Best v Huber, 3 Utah 2d 177, 281 P.2d 208 (1955); Hansen v. Stewart, 761 P.2d 14 (Utah 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Jury §§ 10, 57 to 69, 71, 81, 82, 84 to 89

C.J.S. — 50 C.J S Juries §§ 10, 84 to 113.

A.L.R. — Obtaining jury trial in eminent domain, waiver, 12 A.L.R.3d 7.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A L R.3d 1321.

Issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393

Statute reducing number of jurors as violative of right to trial by jury, 47 A.L.R.3d 895

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties 9 A.L.R.4th 1041.

Right to jury trial in stockholder's derivative action, 32 A.L.R 4th 1111

Right to jury trial in action for declaratory relief in state court, 33 A.L.R 4th 146

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747

Paternity proceedings right to jury trial, 51 A.L.R 4th 565

Right to jury trial in action for retaliatory discharge from employment, 52 A.L.R.4th 1141

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955

Validity of law or rule requiring state court party who requests jury trial in civil case to pay costs associated with jury, 68 A.L.R.4th 343.

Rule 38 of Federal Rules of Civil Procedure: waived right to jury trial as revived by amended or supplemental pleadings, 18 A.L.R. Fed 754

Key Numbers. — Jury ⇐ 10, 25 to 28.

Rule 39. Trial by jury or by the court.

(a) **By jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist, or

(3) Either party to the issue fails to appear at the trial.

(b) **By the court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) **Advisory jury and trial by consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with

an advisory jury or, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Compiler's Notes. — This rule is similar to Rule 39, F.R.C.P

NOTES TO DECISIONS

Analysis

Advisory jury.

—Equity.

When there is a demand for a jury trial in an equity case, the jury will serve only in an advisory capacity unless both parties have clearly consented to accept a jury verdict Romrell v Zions First Nat'l Bank, 611 P 2d 392 (Utah 1980)

Trial court did not commit prejudicial error by allowing a jury to sit in an equity proceeding where the jury was retained merely as an advisory jury to consider the sole question of the reasonableness of plaintiff's reliance on defendant's act Tolboe Constr Co v Staker Paving & Constr Co , 682 P 2d 843 (Utah 1984)

Trial by consent.

—Equity.

——Motion for directed verdict.

Where the case was essentially one in equity but the parties and court appeared to have consented to presenting their case to a jury whose verdict would have "the same effect as if trial by jury had been a matter of right," under Subdivision (c), the determination of whether a directed verdict was proper was to be tested by the same rules governing cases at law Willard v. Milne Inv Co. v Cox, 580 P.2d 607 (Utah 1978).

Trial by court.

—Waiver of court trial.

Even though former statute providing for trial by court in absence of demand for jury was couched in mandatory terms, and a party might have an absolute right to have the issues tried by the court, the right could be waived, as by proceeding to trial before a jury Houston Real Estate Inv Co v Hechler, 47 Utah 215, 152 P 726 (1915)

—Waiver of jury trial.

Where it did not appear that any demand for a jury trial was made, or that any objection or exception was made at any time during trial against right of the court to try the case without a jury, it would be presumed on appeal that a trial by jury was waived Perego v Dodge, 9 Utah 3, 33 P 221 (1893), aff'd, 163 U.S 160, 16 S Ct. 971, 41 L Ed 113 (1896)

Trial by jury.

—Grant of jury trial.

——Absence of demand.

Court did not abuse its discretion in granting jury trial to defendant, under this rule, over plaintiff's objections although defendant had not made proper demand for jury trial under Rule 38, where plaintiff was not prejudiced thereby James Mfg Co v Wilson, 15 Utah 2d 210, 390 P 2d 127 (1964)

—Right.

——Quiet title action.

This rule gives the right to have any legal issue of fact tried by a jury upon proper demand, and plaintiff in an action to quiet title to mining claims was entitled to a jury trial on issues of fact Holland v Wilson, 8 Utah 2d 11, 327 P.2d 250 (1958)

Cited in Randall v Tracy Collins Trust Co., 6 Utah 2d 18, 305 P 2d 480 (1956)

Cited in Goddard v. Bundy, 121 Utah 299, 241 P.2d 462 (1952); Board of Educ. v. Cox, 16 Utah 2d 20, 395 P.2d 55 (1964); Parker v. Rolfson, 525 P.2d 612 (Utah 1974); Dynapac, Inc. v. Innovations, Inc., 550 P.2d 191 (Utah 1976); Olsen v. Cummings, 565 P.2d 1123 (Utah 1977); Pitts v. Pine Meadow Ranch, Inc., 589 P.2d 767 (Utah 1978); Peay v. Peay, 607 P.2d 841 (Utah 1980); Miller Pontiac, Inc. v. Osborne, 622 P.2d 800 (Utah 1981); Kohler v. Garden City, 639 P.2d 162 (Utah 1981); St. Pierre v. Edmonds, 645 P.2d 615 (Utah 1982); Kanzee v. Kanzee, 668 P.2d 495 (Utah 1983); Pease v. Industrial Comm'n, 694 P.2d 613 (Utah 1984); Wiese v. Wiese, 699 P.2d 700 (Utah 1985); In re Estate of Chasel, 725 P.2d 1345 (Utah 1986); Katz v. Pierce, 732 P.2d 92 (Utah 1986); Myers v. Garff, 655 F. Supp. 1021 (D. Utah 1987); Wood v. Weenig, 736 P.2d 1053 (Utah 1987); Fackrell v. Fackrell, 740 P.2d 1318 (Utah 1987); Tripp v. Vaughn, 747 P.2d 1051 (Utah Ct. App. 1987); Blodgett v. Zions First Nat'l Bank, 752 P.2d 901 (Utah Ct. App. 1988); Ramon ex rel. Ramon v. Farr, 770 P.2d 131 (Utah 1989).

COLLATERAL REFERENCES

Am. Jur. 2d. — 46 Am. Jur. 2d Judgments §§ 200, 671 et seq.

C.J.S. — 49 C.J.S. Judgments §§ 228 et seq., 237.

A.L.R. — Incompetence of counsel as ground for relief from state court civil judgment, 64 A.L.R.4th 323.

Relief from judicial error by motion under F.R.C.P. Rule 60(b)(1), 1 A.L.R. Fed. 771.

Propriety of conditions imposed in granting relief from judgment under Rule of Civil Procedure 60(b), 3 A.L.R. Fed. 956.

Construction of Rule 60(a) of Federal Rules of Civil Procedure authorizing correction of clerical mistakes and judgments, orders or other parts of the records and errors therein arising from oversight or omission, 13 A.L.R. Fed. 794.

Construction and application of Rule 60(b)(5) of Federal Rules of Civil Procedure authorizing relief from final judgment where its prospective application is inequitable, 14 A.L.R. Fed. 309.

Independent actions to obtain relief from judgment, order, or proceeding under Rule 60(b) of the Federal Rules of Civil Procedure, 53 A.L.R. Fed. 558.

Lack of jurisdiction, or jurisdictional error, as rendering federal district court judgment "void" for purposes of relief under Rule 60(b)(4) of Federal Rules of Civil Procedure, 59 A.L.R. Fed. 831.

Effect of filing of notice of appeal on motion to vacate judgment under Rule 60(b) of Federal Rules of Civil Procedure, 62 A.L.R. Fed. 148.

Key Numbers. — Judgment ⇐ 294 et seq., 306, 307.

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Compiler's Notes. — This rule is similar to Rule 61, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

ADDENDUM 3

substituted "determines" for "decides" at the end of the fourth sentence.

The 1990 amendment, effective April 23, 1990, deleted "next" after "January" and made punctuation changes in Subsection (2); deleted "not" following "chief justice may" in the third sentence of Subsection (3); deleted "additional" before "duties" in Subsection (5); deleted "where not inconsistent with the law" following "chief justice" and added "as consistent with the law" at the end of Subsection (6).

78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;

(c) discipline of lawyers;

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the Board of State Lands and Forestry;

(iv) the Board of Oil, Gas, and Mining; or

(v) the state engineer;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony; and

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) general water adjudication;

(f) taxation and revenue; and

(g) those matters described in Subsection (3)(a) through (f).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the

Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2-2, enacted by L. 1986, ch. 47, § 41; 1987, ch. 161, § 303; 1988, ch. 248, § 5; 1989, ch. 67, § 1.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, substituted "formal adjudicative proceedings" for "cases" in Subsection (3)(e); added Subsection (3)(f); redesignated former Subsections (3)(f) to (3)(i) accordingly; substituted "(i)" for "(h)" at the end of Subsection (4)(g); and made minor stylistic changes.

The 1989 amendment, effective April 24, 1989, added "and Forestry" at the end of Subsection (3)(e)(iii); rewrote Subsection (4)(a) which read "first degree and capital felony convictions"; substituted "(f)" for "(i)" at the end of Subsection (4)(g); and made minor stylistic changes.

NOTES TO DECISIONS

ANALYSIS

Docketing statement.
—Reference to subsection.
Cited.

Docketing statement.

—Reference to subsection.

In all cases appealed after January 1, 1987, reference in the docketing statement to this section will be considered insufficient; instead the appropriate subsection must be included to alert the Supreme Court that it has original appellate jurisdiction over the case. Gregory v. Fourthwest Invs., Ltd., 735 P.2d 33 (Utah 1987).

Cited in Conder v. A.L. Williams & Assocs., 739 P.2d 634 (Utah Ct. App. 1987).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — The Utah Court of Appeals, 1988 Utah L. Rev. 150.

78-2-4. Supreme Court — Rulemaking, judges pro tempore, and practice of law.

NOTES TO DECISIONS

Cited in Stewart v. Coffman, 748 P.2d 579 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1987 Utah L. Rev. 137.

78-2-5. Repealed.

Repeals. — Laws 1988, ch. 248, § 50 repeals § 78-2-5, Utah Code Annotated 1953, providing that the Supreme Court is always open, effective April 25, 1988.

78-18-1. Basis for punitive damages awards — Section inapplicable to DUI cases — Division of award with state.

(1) (a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

(b) The limitations, standards of evidence, and standards of conduct of Subsection (a) do not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-6-44.

(2) Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

(3) In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of $20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund.

History: C. 1953, 78-18-1, enacted by L. 1989, ch. 237, § 1.

Applicability. — Laws 1989, ch. 237, § 4 provides that the act applies to all claims for punitive damages that arise on or after May 1, 1989

Effective Dates. — Laws 1989, ch. 237, § 4 makes the act effective on May 1, 1989.

78-18-2. Drug exception.

(1) Punitive damages may not be awarded if a drug causing the claimant's harm:

(a) received premarket approval or licensure by the Federal Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. Section 301 et seq. or the Public Health Service Act, 42 U.S.C. Section 201 et seq.;

(b) is generally recognized as safe and effective under conditions established by the Federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

(2) This limitation on liability for punitive damages does not apply if it is shown by clear and convincing evidence that the drug manufacturer knowingly withheld or misrepresented information required to be submitted to the Federal Food and Drug Administration under its regulations, which information was material and relevant to the claimant's harm.

History: C. 1953, 78-18-2, enacted by L. 1989, ch. 237, § 2.

Applicability. — Laws 1989, ch. 237, § 4 provides that the act applies to all claims for punitive damages that arise on or after May 1, 1989.

Severability Clauses. — Laws 1989, ch. 237, § 3 provides that if any provision of the act, or the application of any provision to any person or circumstance, is held invalid, the remainder of the act is to be given effect without the invalid provision or application.

Effective Dates. — Laws 1989, ch. 237, § 4 makes the act effective on May 1, 1989.

COLLATERAL REFERENCES

A.L.R. — Credit card issuer's liability, under state laws, for wrongful billing, cancellation, dishonor, or disclosure, 53 A.L.R.4th 231.

78-27-50. Financial information privacy — Act inapplicable to certain official investigations.

Nothing in this act shall apply where an examination of said records is a part of an official investigation by any local police, sheriff, city attorney, county attorney, the attorney general, the Department of Public Safety, the Office of Recovery Services of the Department of Human Services, or the Department of Commerce.

History: L. 1979, ch. 166, § 1; 1990, ch. 133, § 18; 1990, ch. 183, § 57.

Amendment Notes. — The 1990 amendment by ch. 133, effective April 23, 1990, substituted "the Department of Public Safety, the Bureau of Recovery Services of the Department of Human Services, or the Department of Commerce" for "or the state Department of Public Safety, or the Bureau of Recovery Services, Department of Social Services."

The 1990 amendment by ch. 183, effective April 23, 1990, substituted "Office of Recovery Services, Department of Human Services" for "bureau of Recovery Services, Department of Social Services."

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

78-27-51. Inherent risks of skiing — Public policy.

COLLATERAL REFERENCES

A.L.R. — Ski resort's liability for skier's injuries resulting from condition of ski run or slope, 55 A.L.R.4th 632.

78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

History: L. 1981, ch. 13, § 1; 1988, ch. 92, § 1.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, inserted the Subsection designation (1); deleted "where not otherwise provided by statute or agreement" following "civil actions" in Subsection (1); substituted "shall" for "may" following "the court" in Subsection (1); added "except under Subsection (2)" at the end of Subsection (1) and added Subsection (2).

ADDENDUM 4

have him relate what that reputation is. State v. Goodliffe, 578 P.2d 1288 (Utah 1978).

Witness' individual opinon is inadmissible as evidence of person's reputation. State v. Goodliffe, 578 P.2d 1288 (Utah 1978).

Victim's reputation.

In rape prosecution, where evidence shows that the association between the parties came about in a sociable and peaceable manner and a transition to violence is claimed, there is a genuine and critical issue as to consent so that the probative value of the victim's reputation as to moral character outweighs the negative factors and justifies admission of evidence as to her reputation. State v. Howard, 544 P.2d 466 (Utah 1975).

Cited in State v. Speer, 750 P.2d 186 (Utah 1988).

COLLATERAL REFERENCES

Utah Law Review. — Rape Victim Confrontation — 1985, 1985 Utah L. Rev. 3, 687.

Am. Jur. 2d. — 29 Am. Jur. 2d Evidence § 340 et seq.; 81 Am. Jur. 2d Witnesses § 668.

C.J.S. — 22A C.J.S. Criminal Law §§ 676 to 681; 32 C.J.S. Evidence §§ 422 to 437; 98 C.J.S. Witnesses § 498 et seq.

A.L.R. — Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses, 17 A.L.R.3d 327.

Key Numbers. — Criminal Law ⇐ 375 to 381; Evidence ⇐ 106, 152, 155(2), Witnesses ⇐ 340 et seq.

Rule 406. Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Advisory Committee Note. — This rule is the federal rule, verbatim, and is comparable to Rule 49, Utah Rules of Evidence (1971). The substance of Rule 50. Utah Rules of Evidence (1971) providing for the method of proof of habit or custom and allowing evidence in the form of opinion as well as specific instances when the number of instances is sufficient to warrant a finding of habit or custom was deleted by Congress with a note by the House Judiciary Committee that the method of proof should be left with the Court Compare Rule 406(b), Uniform Rules of Evidence (1974), which is Rule 406(b) as originally promulgated by the United States Supreme Court.

COLLATERAL REFERENCES

Utah Law Review. — Uncharged Misconduct Evidence in Child Abuse Litigation, 1988 Utah L. Rev. 479.

Am. Jur. 2d. — 29 Am. Jur. 2d Evidence § 303.

C.J.S. — 32 C.J.S. Evidence § 582.

A.L.R. — Pedestrian, admissibility of evidence of habit, customary behavior, or reputation as to care of on question of his care at time of collision with motor vehicle giving rise to his injury or death, 28 A.L.R.3d 1293.

Motor vehicle driver or occupant, admissibility of evidence of habit, customary behavior, or reputation as to care of on question of his care at time of occurrence giving rise to his injury or death, 29 A.L.R.3d 791.

Proof of mailing by evidence of business or office custom, 45 A.L.R 4th 476

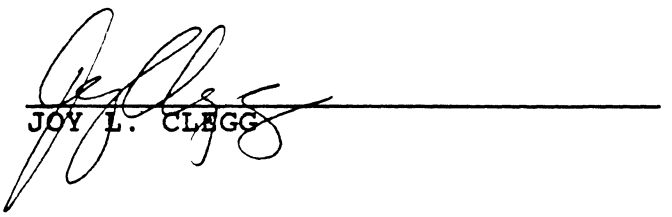
Admissibility of defendant's evidence of industry custom or practice in strict liability action, 47 A.L.R.4th 621.

Habit or routine practice evidence under Uniform Evidence Rule 406, 64 A.L.R.4th 567.

Key Numbers. — Evidence ⇐ 138.

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Brief of Respondent was mailed, postage prepaid, to Edward K. Brass, Attorney for Defendant/Appellant, 321 South 600 Esat, Salt Lake City, Utah 84102 on the 5th day of July, 1990.



JOY L. CLEGG